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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 465

ATLANTIC STATES MOTOR LINES, INCORPORATED,
PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA, at the Relation of the STATE CORPORATION COMMISSION,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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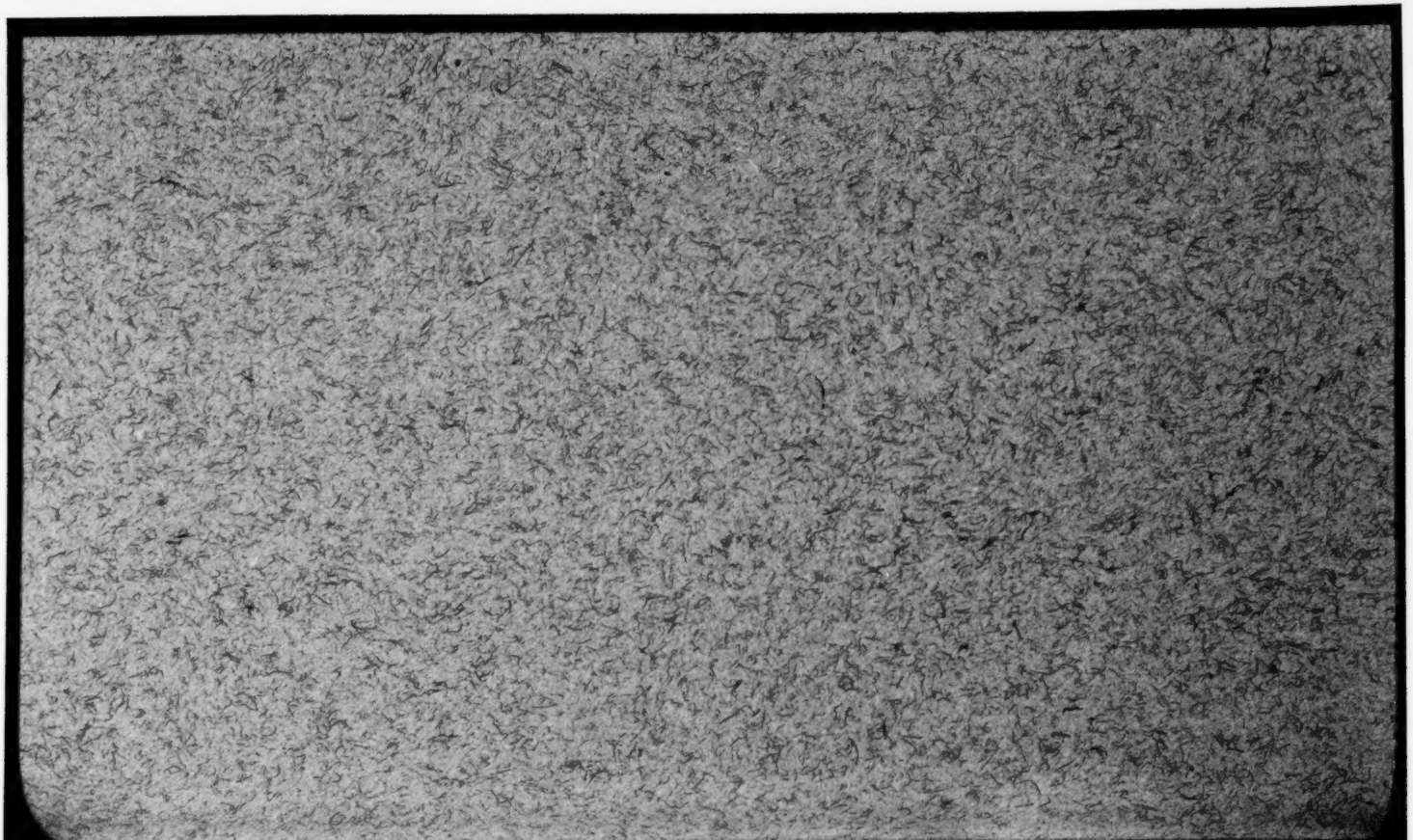

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

This brief is filed on behalf of respondent, Commonwealth of Virginia, at the relation of the State Corporation Commission, in opposition to the granting of the writ of *certiorari* prayed for in the petition, for the reason that the case presents no Federal question of substance decided by the court below not heretofore determined by this Court.

STATEMENT OF THE CASE

Petitioner is a North Carolina corporation and a motor carrier operating over the highways of the Commonwealth of Virginia. In proceedings before the State Corporation Commission of Virginia it was determined that for the period from July 1, 1944, through June 30, 1946, the petitioner failed to purchase in Virginia gasoline or other motor fuel necessary for its operations as a motor carrier within Virginia to the extent of 130,207.9 gallons, and that the petitioner failed to pay into the treasury of the State of Virginia as an alternative to such purchase an amount equivalent to the prevailing State tax on the said amount of 130,207.9 gallons of gasoline or motor fuel, which equivalent amount was $6,510.04. (R. pp. 50, 51).

Acting under the provisions of Chapter 108, Acts of Assembly of Virginia of 1942, the State Corporation Commission entered judgment against the petitioner whereby the petitioner was ordered to pay to the Commonwealth of Virginia the sum of $6,510.04 plus a penalty of $325 for its failure to comply with the provisions of said Act.

On Appeal by the petitioner to the Supreme Court of Appeals of Virginia the judgment of the State Corporation Commission was affirmed.

Before the State Corporation Commission and the Supreme Court of Appeals of Virginia the petitioner challenged the validity of Chapter 108 of the Acts of Assembly of Virginia of 1942 (printed as the Appendix to the Petition for Writ of Certiorari) as being in violation of the Commerce Clause of the Constitution of the

United States. It was contended that the Act required the purchase of motor fuel in Virginia and was an unlawful attempt to regulate interstate commerce. It was further contended that the statute discriminates against interstate commerce and that it violates the Commerce Clause of the Constitution of the United States in imposing a tax upon the privilege of using an instrumentality of interstate commerce.

The petitioner also contended that the evidence did not establish the amount of motor fuel necessary for use by the petitioner in its Virginia operations and challenged the method used to determine the quantity of motor fuel for such use.

OPINIONS BELOW

As will be seen from the opinion of the State Corporation Commission in this case (R. pp. 50-64) all relevant facts in this case were substantially the same as those in the case of *Commonwealth of Virginia, at the relation of the State Corporation Commission* v. *Mason and Dixon Lines, Incorporated* (Case No. 8376 before the State Corporation Commission) and substantially the same defenses were offered by the respective carriers in the two cases.

This case was decided by the State Corporation Commission a few months after the *Mason and Dixon Lines Case* and the earlier case was considered so identical and controlling that the Commission adopted its opinion in the former case as its opinion in this case. Both cases were appealed to the Supreme Court of Appeals of Virginia,

the appeal being a matter of right, and in the opinion of that court in this case it was also pointed out that its decision in the former case, *Mason and Dixon Lines, Inc.* v. *Commonwealth*, 185 Va. 877, 41 S. E. 2d. 16, was in all respects controlling, as it involved the same issues and were without any factual distinction. (R. pp. 65-67).

In these decisions of the State Corporation Commission of Virginia and of the Supreme Court of Appeals of Virginia it was held that the statute under consideration imposed upon *all* motor carriers operating for compensation over the highways of Virginia, either in interstate *or intrastate* commerce, a compensatory charge or tax for the use of such highways measured by the amount of motor fuel consumed in Virginia operations; that such could be paid, either by buying in Virginia and paying the regular motor fuel tax thereon the motor fuel necessary for operating in Virginia, or by paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of such fuel. It was held that, since the contribution exacted for the maintenance, construction and reconstruction of the highways provided by the State was proportionate to the use made of such highways, no unconstitutional burden was placed upon interstate commerce. (See opinion of Downs, Chairman of the Commission, R. pp. 50-64).

The Supreme Court of Appeals of Virginia sustained the conclusions of the State Corporation Commission and held that there was no discrimination as between interstate and intrastate commerce. It was further held that the finding of the Commission as to the amount of

motor fuel necessary for petitioner's Virginia operations was supported by competent evidence. (See opinion of Justice Hudgins, R. pp. 65-67).

A petition for writ of *certiorari* was presented to this Court in the first of these two cases, *Mason and Dixon Lines, Incorporated* v. *Commonwealth of Virginia, at the Relation of the State Corporation Commission* at the October term, 1946. (See Record No. 1117 of the October term, 1946, of this Court). In that petition exactly the same questions that are raised by the petition in the present case were presented. The petition for *certiorari* was denied by this Court on April 14, 1947. See ..... U. S. ....., 91 L. Ed. 983 (Advance Sheets No. 12). The issues presented in the present case have, therefore, previously been presented to this Court on petition for *certiorari*, which petition was denied. This brief in opposition to the granting of *certiorari* will, consequently, be largely the same as that filed in the *Mason and Dixon Lines Case.*

THE QUESTION PRESENTED

The petitioner states three questions which he desires to present to this Court if *certiorari* is granted. The only substantial question, however, is whether the statute imposes a valid compensatory charge for the use of Virginia highways by the petitioner and others operating as motor carriers for compensation in Virginia.

ARGUMENT

I.

The Statute Does Not Require The Purchase Of Motor Fuel In Virginia, But Merely Imposes a Compensatory Charge Upon Motor Carriers Using The Highways Of Virginia.

The petitioner contends that the question before this Court is whether the State of Virginia may constitutionally require the purchase of gasoline in Virginia. This flies squarely into the teeth of the statute and the construction placed upon the same by the State Corporation Commission and the State Supreme Court. The statute provides that every motor carrier operating over the highways of Virginia for compensation, whether in intrastate or interstate commerce or both, shall—

> "* * * purchase, within the State, gasoline or other motor fuel, at least equal to that amount necessary for use in the operation as a motor carrier within the State, or such motor carrier shall, in lieu of making such purchase, pay into the treasury, for credit to the State Highway Fund, an amount equivalent to the prevailing State tax on the amount of gasoline, or other motor fuel, necessary for its operation as a motor carrier within this State over and above the amount of tax paid on gasoline, or other motor fuel actually purchased in the State." (Acts of 1942, Chap. 108, Sec. 1)

There is no requirement whatsoever that any motor carrier purchase one drop of gasoline in Virginia. The statute provides for two equally applicable, alternative

methods, or a combination of both, by which motor carriers may pay the compensatory charge for the use of the highways of Virginia. The petitioner alleges that the statute demands one particular method and then quotes only a portion of the statute. As pointed out by the Chairman of the Commission in his opinion (R. p. 56), if the petitioner sees fit to purchase its motor fuel requirements elsewhere, it is free to do so, but, not wishing to purchase its Virginia requirements in the State, it must contribute its fair share toward the maintenance of the highways over which it travels.

Justice Hudgins, of the State Supreme Court, said in his opinion (R. p. 67):

> "* * * A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers. Motor carriers for hire, whether doing an intra—or interstate business, have the election to purchase gasoline in Virginia and use the same on her highways, or to buy the gasoline elsewhere and pay the use tax on so much of it as is used to operate its motor vehicles over the highways of the State. No carrier is required to do both, but each must pay the tax in one or the other of the two methods set forth in the statute."

The Act imposes no unreasonable burden upon interstate commerce. If the petitioner, or any motor carrier, whether operating in interstate or intrastate commerce, finds that it can purchase motor fuel without the State on better terms than it can do so within the State, it is

free to do so. It is simply required to pay its fair share of maintaining the highways it uses in this State. The fact that it may pay a sales tax to the State in which it purchases the motor fuel is no reason it should be relieved of that obligation.

As was held by the courts below, the Act clearly imposes a compensatory charge which is not only measured by the *quantum* of use of the highways, but which is expressly dedicated to the construction and maintenance of such highways. If a motor carrier adopts the method of paying the charge by buying gasoline in Virginia and paying the regular gasoline tax on the motor fuel "necessary for use in the operation as a motor carrier in this State", the proceeds are dedicated to the maintenance and construction of highways by section 6 of Chapter 212 of the Acts of 1932, as amended by Chapter 206 of the Acts of 1942.* If the motor carrier adopts the method of paying directly into the State treasury an amount equivalent to the prevailing State tax on the amount of gasoline "necessary for its

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* "Section 6. Disposition of funds collected.—After providing for the refunds under this act, the director shall promptly pay all taxes and fees collected by him under this act into the State Treasury. The revenue derived from the tax levied as aforesaid is hereby appropriated for the construction of the roads and projects comprising the State primary highway system and for the construction or maintenance of the roads and projects comprising the State secondary highway system and shall be applied to no other purpose, except that there may be paid out of this fund as contribution towards the construction, reconstruction and/or maintenance of streets in cities and towns such sums as may be provided by law, and except further, that such sums out of said funds may be expended for the operation and maintenance of the highway department and the Division of Motor Vehicles as may be provided by law, provided, however, the Governor is hereby authorized to transfer out of the said gasoline tax an amount not exceeding twenty-five thousand ($25,000.00) dollars annually for the purpose of inspection of gasoline and motor grease measuring and/or distributing equipment, and/or for inspection and analysis of gasoline for purity; and there shall be paid out of this fund the amount appropriated to the Corporation Commission for the Division of Aeronautics."

operation as a motor carrier within this State", the proceeds are dedicated to that purpose by sections 1 and 3 of Chapter 108 of the Acts of 1942.

That such a compensatory charge for the use of public highways is valid cannot be seriously questioned. The authorities overwhelmingly support this view. The following from *Interstate Transit* v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953, 964-967:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce * * * it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon * * *. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use * * *, *or by the express allocation of the proceeds of the tax to highway purposes*, as in *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, *supra*, or otherwise. *Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.* * * *" (Italics supplied)

is directly applicable on principle to the instant case when the nature and disposition of the charge here involved are considered, and the record discloses not even a suggestion that the charge does not bear a "reasonable relation to the privilege of using the highways or (that it) is discriminatory."

The above principle has been adhered to time and again. Among the many cases may be mentioned *Hendrick* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551; *Clark* v. *Poor*, 274 U. S. 554, 71 L. Ed. 1199; *Ingels* v. *Morf*, 300 U. S. 290, 81 L. Ed. 653; *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 83 L. Ed. 495.

The petitioner does not deny that the charge imposed by the statute is compensatory. Nor is it contended that the imposition of such a charge violates the Commerce Clause of the Constitution of the United States. In view of the authorities sustaining such a charge the petitioner could not make such a contention with hope of success. He, therefore, contends for a construction of the statute not justified by its terms and which was rejected by both the State Corporation Commission and the Supreme Court of Appeals of Virginia. But the Virginia Supreme Court of Appeals has the final say in the interpretation of Virginia statutes and its construction will be accepted here. *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101, 104, 89 L. Ed. 101, 103. This Court, therefore, will not construe the statute differently in order to render it unconstitutional as advocated by the petitioner.

II.

The Petitioner's Attack Upon The "Formula" Used By The State Corporation Commission To Determine The Amount Of Motor Fuel Necessary For Petitioner's Virginia Operations Presents No Federal Question.

The statute fixes the base or measure of the compensatory charge as the gasoline "necessary for use" in Virginia operations. The petitioner was charged with not paying into the treasury of Virginia "an amount equivalent to the prevailing State tax on the amount of gasoline or other motor fuel necessary for its operation as a motor carrier within this State (Virginia) over and above the amount of tax paid on gasoline or other motor fuel actually purchased in the State." (R. p. 6)

The uncontradicted testimony of witness Boatwright is that the petitioner for the period from July 1, 1944, to June 30, 1946, failed by 130,207.9 gallons to purchase in Virginia gasoline necessary for use in its Virginia operations, and that it likewise failed to pay into the State treasury an amount equivalent to the prevailing State gasoline tax on this 130,207.9 gallons, which amounted to the sum of $6,510.40. See Record, page 20, where the following testimony appears:

> "Q. Mr. Boatwright, do I understand correctly from your audit and from the report of the Company which you have just explained and testified to with respect thereto, that the Company now is deficient in its purchases in the amount of 130,207.9 gallons, which amounts to

in dollars and cents $6,510.40?

"A. That is correct as of July 1st, 1946.

"Q. I ask you if the figures in your office reflect that any part of this $6,510.40 has been paid to the State of Virginia?

"A. The figures in our office do not show any payments against the amount.

"Q. Had any payment been made, would your figures indicate such a payment had been made?

"A. They would have."

The record shows that this testimony was based upon an audit of the petitioner's books for the period from July 1, 1944, to April 1, 1946, and from a report filed by the petitioner for the period from April 1, 1946, to June 30, 1946. The petitioner attacks this evidence because, in arriving at the amount of gasoline necessary for the petitioner's Virginia operations, the percentage of the carrier's entire operations (miles traveled) which took place in Virginia was applied to the total number of gallons of gasoline purchased for its entire operations. If the formula had not been reasonably accurate, petitioner could have presented evidence to substantiate its contention, but no such evidence was presented.

The question before the State Supreme Court was whether the evidence supported the finding as to the amount of gasoline necessary for the petitioner's Virginia operations. That court held that the finding was sustained by satisfactory evidence. (R. p. 67). The record presents no basis for a review of this question here

III.

The Statute Applies To Intrastate Carriers As Well As Interstate Carriers And In No Way Discriminates Against The Latter.

The statute expressly applies to intrastate carriers as well as interstate carriers. See the Appendix to the petition. The petitioner's charge that it is applied only to interstate carriers is utterly without foundation and is contrary, not only to its express terms, but to the decisions of the State Corporation Commission and the Supreme Court of Appeals of Virginia. If an intrastate carrier purchases without the State gasoline necessary for its operations within the State, it must pay an amount equivalent to the State tax on such gasoline, just as in the case of an interstate carrier.

We quote again from the opinion of the State Supreme Court:

> "The same attorney appeared for appellant and for the Mason and Dixon Lines, Inc. In the latter case, he contended that the statute was unconstitutional because it required interstate carriers to purchase gasoline used in Virginia from local dealers. This contention having been rejected, he now contends that the statute is unconstitutional because it has been construed to be a use tax and is not paid by intrastate carriers. A complete answer to this contention is that intrastate carriers purchase their gasoline from local dealers and pay the tax to such dealers. *Motor carriers for hire, whether doing an intra*

—or interstate business, have the election to purchase gasoline in Virginia and use the same on her highways, or to buy the gasoline elsewhere and pay the use tax on so much of it as is used to operate its motor vehicles over the highways of the State. No carrier is required to do both, but each must pay the tax in one or the other of the two methods set forth in the statute.

"Mr. A. S. Boatwright, the assistant tax assessor working under the supervision of the Corporation Commission charged with the enforcement of the provisions of this act, stated that 'the Act is enforced against all motor vehicle carriers operating for compensation, whether contract, common carrier or for hire carriers, of which the Commission has knowledge. Where it is found that a carrier is operating exclusively in Virginia, reports are not required since such carriers purchase their gasoline in this State.'

"He also said: 'When it has been ascertained that such carrier is not complying with the Act steps are taken to enforce such a compliance.'" (R. p. 67)

There is, therefore, no basis for the charge that the statute or its administration discriminates against interstate commerce.

CONCLUSION

For the reasons stated it is submitted that the petition-

er does not present a case wherein the court below decided a Federal question of substance contrary to the applicable decisions of this court, but on the contrary the only Federal question presented has been decided by the State court in line with the decisions of this Court and this question was previously presented to the Court in the petition for *certiorari* in the case of *Mason and Dixon Lines, Incorporated* v. *Commonwealth*, U. S. ....., 91 L. Ed. 983, which petition was denied. It is submitted, therefore, that the petition for a writ of *certiorari* in this case should be denied.

Respectfully submitted,

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